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No. 88-1569

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE CENTER FOR PUBLIC INTEREST LAW AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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62 pg

QUESTION PRESENTED

Whether the government may, consistent with the first amendment, limit campaign expenditures by for-profit corporations that pose the well-recognized potential for corrupting the electoral process, and, if so, whether a state statute that fails to require ideological, non-profit corporations to segregate monies received from for-profit corporations from its funds expended on political campaign speech may nonetheless constitutionally regulate expenditure of such funds.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	viii
SUMMARY OF ARGUMENT.....	xi
ARGUMENT.....	1
I. THE REGULATION OF CORPORATE CAMPAIGN EXPENDITURES, NECESSITATED BY THE WELL-RECOGNIZED POTENTIAL FOR CORRUPTION OF THE ELECTORAL PROCESS BY SUCH EXPENDITURES, IS NOT PROHIBITED BY THE FIRST AMENDMENT.....	1
A. Money and speech are not congruent.....	6
B. Expenditures may be limited where the speech that such expenditures facilitate may itself be limited--irrespective of its content -- because of inherent limitations of the forum or system of free speech...	10
C. Reasonable expenditure limits are required to ration access to the most expensive and effective means of political speech on some basis other than wealth.....	18
D. The constitutionality of government rationing of access to effective but limited fora on some basis other than wealth is reinforced by the need to reduce the corrupting effects of money on the political process.....	23

	Page
E. Rationing access to effective but limited campaign fora on some basis other than wealth is especially justified when applied to corporations organized for profit.....	30
II. THE MICHIGAN LEGISLATURE HAS NOT EXERCISED ITS POWER TO BAN ALL CORPORATE FUNDS FROM ENTERING THE POLITICAL MARKETPLACE, BUT RATHER HAS SIMPLY BARRED ALL NON-PAC CORPORATE EXPENDITURES; HENCE, EXPENDITURES BY THE CHAMBER -- A NON-PROFIT IDEOLOGICAL CORPORATION PROTECTED UNDER MCFL -- ARE LAWFUL..	38
CONCLUSION.....	47

TABLE OF AUTHORITIES

Cases	Page
Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983)	32
Brown v. Hartlage, 456 U.S. 45 (1982)	8
Buckley v. Valeo, 424 U.S. 1 (1976)	passim
Bullock v. Carter, 405 U.S. 134 (1971)	29
CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973)	20
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	7,9
Eisenstadt v. Baird, 405 U.S. 438 (1972)	32
FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)	passim
FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985)	passim
FEC v. National Right to Work Committee, 459 U.S. 197 (1982)	passim
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	passim
In re Primus, 436 U.S. 412 (1978)	31
Lubin v. Panish, 415 U.S. 709 (1974)	29
Michigan State Chamber of Commerce v. Austin, 856 F.2d 783 (6th Cir. 1988)	1,40-41

	Page
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)	10
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)	32
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	31
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	32
Paris Adult Theatre I v. Slayton, 413 U.S. 49 (1973)	7
Perry v. Sinderman, 408 U.S. 593 (1972)	42
Pipefitters Local Union 562 v. United States, 407 U.S. 385 (1972)	3
Police Dept. v. Mosley, 408 U.S. 92 (1972)	9
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	19-21
Schacht v. United States, 398 U.S. 58 (1970)	7
Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)	11
Speiser v. Randall, 357 U.S. 513 (1958)	43
Stanley v. Georgia, 394 U.S. 557 (1969)	6

Page

Texas v. Johnson, 57 U.S.L.W. 4770 (June 20, 1989)..... 7

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969)..... 7

United States v. Container Corp., 393 U.S. 333 (1969)..... 34

United States v. International Union, United Automobile Workers, 352 U.S. 567 (1957)..... 3

United States v. O'Brien, 391 U.S. 367 (1968)..... 7,9

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)..... 31

Statutes & Regulations

11 C.F.R. Sec. 102.5..... 43

11 C.F.R. Sec. 114.12(a)..... 39

26 C.F.R. Sec. 53.4945-2..... 44

Books & Articles

M. Barone & G. Ujifusa, The Almanac of American Politics: 1988 (1987).... 25

Budde, Business-Related Political Action Committees -- A Permanent Force After One Decade, 3 J.L. & Pol. 449 (1986)..... 27

Page

Cong. Res. Svce., Report on Campaign Financing (Update, July 2, 1987).. 26

Conlon, The Declining Role of Individual Contributions in Financing Congressional Campaigns, 3 J.L. & Pol. 467 (1986)..... 25

Cox, Constitutional Issues in the Regulation of the Financing of Election Campaigns, 31 Cleve. St. L. Rev. 395 (1982)..... 12,28

T. Emerson, The System of Freedom of Expression (1970)..... 14,23

Freund, Commentary in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions (Citizens' Research Foundation Study No. 18) (1971)... 28

A. Meiklejohn, Free Speech and Its Relevance to Self-Government (1948)..... 13,15

Wald, Two Unsolved Constitutional Problems, 49 U. Pitt. L. Rev. 753 (1988)..... 25

Wright, Money and the Pollution of Politics: Is the First Amendment an Obtsacle to Political Equality?, 82 Colum. L. Rev. 609 (1982)....15,16,25

Comments, Special Forum on Proposed Reforms in Campaign Financing, 3 J.L. & Pol. 419 (1986)..... 24

INTEREST OF AMICUS[1]

The Center for Public Interest Law is an academic public interest research and advocacy center at the University of San Diego School of Law. The Center has been vitally interested and involved in issues of open government; taxpayer, consumer and voter advocacy; and political, regulatory and systemic reform.

The Center for Public Interest Law has participated in numerous public interest law suits, including the successful defense of Proposition 103, the "Voter Revolt to Cut Insurance Rates" initiative passed by the California electorate in November, 1988. The

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[1] Consent to the filing of this brief has been obtained from counsel to the paries.

California Supreme Court unanimously upheld the measure in May, 1989. The Center is also the named plaintiff in litigation defending Proposition 68, the "Campaign Spending Limits Act" initiative passed by the voters in June, 1988, which raises many of the same issues presented in this case.

The Center also publishes the California Regulatory Law Reporter (the only publication in the Nation that comprehensively covers the regulation of business by state government), educates 40 interns each year in areas of state regulatory procedures, and engages in advocacy projects.

These projects have included drafting the law that provided the California Open Meetings Act with a meaningful civil remedy; drafting a counterpart open meetings law applicable to local governments; the creation by regulatory petition of an entity to represent ratepayers before the California Public Utilities Commission; and the drafting

of and successful lobbying for the first deregulation statute to abolish a major regulatory agency in California in the past twenty years. The Center has particularly advocated the strengthening of open meetings laws and related "sunshine" statutes.

SUMMARY OF ARGUMENT

The expenditure of money, generally speaking, is not speech; rather, it is conduct that facilitates speech. The government may not, however, impose limits on the expenditure of money in such a way that the exercise of first amendment rights is itself unconstitutionally constrained.

Such an expenditure limitation does not unconstitutionally constrain speech, however, where the speech may itself be limited to promote the values of the system of freedom of expression. Such is the case when a forum is naturally limited in such a way that government rationing is justified in order to keep some speakers from monopolizing access to the forum whether due to "unregulated talkativeness" or unregulated expenditure of their wealth.

Mass media -- particularly electronic mass media -- have become the indispensable and central instruments of political speech, and have helped drive the spiraling costs of campaigning for public office. This Court has already recognized that access to these media may be rationed on some basis other than wealth. The failure to do so has made wealth even more important in the political context, and led to subtle and not-so-subtle corruption of the political process, which this Court has recognized may in itself justify some regulation of speech-related conduct.

The impact of concentrated wealth on the political process and on the system of freedom of expression is exacerbated in the context of for-profit corporate expenditures. First amendment interests in protecting such expenditures are at their lowest. The government may therefore regulate or prohibit

entirely corporate political campaign expenditures.

Non-profit, ideological corporations are protected from this power, however, by the first amendment. The Chamber of Commerce, as an ideological non-profit that is not the subsidiary of any profit-making corporation, is entitled to that protection, even if this arguably represents a potentially large loophole through which for-profit corporate funds could leak back into the campaign arena. Legislatures have the means at their disposal to prohibit the funneling of for-profit corporate monies through such ideological associations; the law in question has not utilized such means, however.

ARGUMENT

I. THE REGULATION OF CORPORATE CAMPAIGN EXPENDITURES, NECESSITATED BY THE WELL-RECOGNIZED POTENTIAL FOR CORRUPTION OF THE ELECTORAL PROCESS BY SUCH EXPENDITURES, IS NOT PROHIBITED BY THE FIRST AMENDMENT.

There is no doubt that political speech "lies at the core of the first amendment." Buckley v. Valeo, 424 U.S. 1, 14-15 (1976). And as the Court of Appeals held below, "[t]he Chamber [of Commerce] does not surrender its first amendment rights merely by assuming the corporate form of organization." Michigan State Chamber of Commerce v. Austin, 856 F.2d 783, 787 (6th Cir. 1988) (emphasis added). And see FEC v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238, 263 (1986) (MCFL "does not suddenly present the spectre of corruption merely by assuming the corporate form") (emphasis added); First National Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978) ("speech

that otherwise would be within the protection of the First Amendment [does not] lose[] that protection simply because its source is a corporation") (emphasis added).

However, this Court has long recognized the special justifications for regulation of corporate expenditures in the campaign context. "[P]reventing corruption or the appearance of corruption," are, in fact, "the only legitimate and compelling government interests thus far identified for restricting campaign finances." FEC v. National Conservative Political Action Committee ("NCPAC"), 470 U.S. 480, 496-97 (1985). And the necessity of fighting corruption or the appearance thereof has been recognized by this Court as a particularly pregnant concern in the corporate context. "[T]he special characteristics of the corporate structure require particularly careful regulation." FEC v. National Right to Work Committee ("NRWC"), 459 U.S. 197, 209-10 (1982).

As the Court noted in MCFL, 479 U.S. at 257, "the long history of regulation of corporate political activity," is grounded on the need to restrict "the influence of political war chests funneled through the corporate form," NCPAC, 470 U.S. at 501; "eliminate the effect of aggregated wealth on federal elections," Pipefitters Local Union 562 v. United States, 407 U.S. 385, 416 (1972); curb the political influence of "those who exercise control over the large aggregations of capital," United States v. International Union, United Automobile Workers, 352 U.S. 567, 585 (1957); and regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," NRWC, 459 U.S. at 207.

The Court therefore wrote in MCFL that "[r]egulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the

potential for unfair deployment of wealth for political purposes," 479 U.S. at 259, and that the concerns that arise from allowing for-profit corporations to wield their economic clout in the political arena justify departure from the standard first amendment analysis applied to advocacy expenditures by individuals and voluntary associations.

The MCFL Court, however, specifically did not decide the constitutional limits on regulation of political expenditures by traditional profit-making corporations, MCFL, 479 U.S. at 263. In reaching its holding, however, the Court did note that regulations requiring that campaign spending be accomplished out of segregated political action funds were "of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)." 479 U.S. at 259 n.12.

Nevertheless, the NCPAC Court asserted that "[i]n Bellotti, of course, we did not reach, nor do we need to reach in these cases, the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." 470 U.S. at 496.

Amicus respectfully submits that this case presents the Court with an opportunity to re-evaluate both Bellotti's assessment that corporations are entitled to full first amendment protection, and, in particular, Buckley's emphasis on money as a form of speech, 424 U.S. at 16 ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."). In short, it is therefore urged that the Court recognize that free speech rights do not

inure to the profit-making corporate form to such an extent as to prohibit legislative proscription and, a fortiori, lesser regulation of such corporations' political campaign expenditures.

A. Money and speech are not congruent.

The expenditure of money is not speech. The act of spending money as one chooses is itself therefore afforded no particular constitutional protection. It is generally accepted that the government may prohibit individuals from spending money to purchase narcotic or haleucenogenic drugs; firearms; the services of prostitutes; slaves; or votes. Despite the first amendment right to possess and read obscene pornography, Stanley v. Georgia, 394 U.S. 557 (1969), individuals may nonetheless be prohibited from spending money in pursuit of such activities. Paris

Adult Theatre I v. Slayton, 413 U.S. 49 (1973) ("A man may be entitled to read an obscene book in his room . . .. But if he demands a right to obtain the books and pictures he wants in the market . . . then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.") (emphasis omitted).

Of course, the giving or spending of money is an action that, like many actions, can be imbued with expressive conduct. See, e.g., Texas v. Johnson, 57 U.S.L.W. 4770, 4772 (June 20, 1989) (flag burning); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (sleeping); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 505 (1969) (wearing of armbands); United States v. O'Brien, 391 U.S. 367, 376 (1968) (burning of draft card); Schacht v. United States, 398 U.S. 58 (1970) (wearing of military uniforms).

The giving of money to a cause or candidate, including the amount given, can be an expressive act. But the amount given or spent does not in and of itself necessarily indicate intensity of support -- it might merely reflect the giver's ability to pay. Cf. Buckley, 424 U.S. at 21 ("At most, the size of the contribution provides a very rough index of the intensity of . . . support . . .."). Thus, neither does the spending or giving away of money in itself constitute speech, nor do limitations on the level of expenditures (at least beyond the initial quantum expressing support) pose any significant infringement on free expression in terms of whatever expressive value inheres in the actual giving or expending of the money.

While government clearly cannot suppress the propagation of political views, see, e.g., Brown v. Hartlage, 456 U.S. 45 (1982) (first amendment has its "fullest and most

urgent" application in the case of regulation of the content of political speech); Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972), it is not at all apparent that that principle applies "to the expenditure of money to propagate political views, rather than to the propagation of those views unaccompanied by the expenditure of money." NCPAC, 470 U.S. at 493. Cf. O'Brien, 391 U.S. at 376-77 (regulation of speech-related conduct is constitutional if it serves important governmental interest and if that interest is unrelated to suppression of speech); Clark v. Community for Creative Non-Violence, 468 U.S. at 293.

Any first amendment limitation on the regulation of campaign expenditures and contributions, then, must be found in the extent to which the limitation of monetary expenditures constrains constitutionally protected speech made possible by those expenditures.

B. Expenditures may be limited where the speech that such expenditures facilitate may itself be limited -- irrespective of its content -- because of inherent limitations of the forum or system of free speech.

In some instances prohibiting the spending of money would clearly foreclose constitutionally protected opportunities for speech and thus run afoul of the first amendment. As the Court noted in Buckley,

> virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies necessitate hiring a hall and publicizing the event.

424 U.S. at 19. And see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (state may not impose additional tax on paper and ink required to produce newspapers).

Thus, first amendment actors must be allowed to pay for the ink for their presses, the paper for their handbills, even the administrative overhead for their first amendment activities, see Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984). But clearly not all limitations on individuals' ability to expend money to propagate their views unconstitutionally limits speech, for two reasons: (i) the expenditure limitation may have negligible, if any, effect on the exercise of the first amendment right, or (ii) the exercise of the first amendment right itself may conflict with the requirements of the system of freedom of expression and may thus properly be limitable.

An example of the first situation would be a campaign expenditure limit of $1 million. Virtually no person or entity (other than the official campaign organization itself) is likely to spend $1

million on campaign-related speech. But see Cox, Constitutional Issues in the Regulation of the Financing of Election Campaigns, 31 Cleve. St. L. Rev. 395, 395 (1982) ("The first massive infusion of special interest money into a federal election campaign occurred in 1832 when Nicholas Biddle and the Bank of the United States spent $800,000 -- $1,000,000 in present-day dollars in a vain effort to prevent the reelection of Andrew Jackson.")

The lower the ceiling the more pressing the question whether, and to what extent, the ability to speak is actually being impinged by the limitation. This is a factual question answerable only by reference to the actual workings of the real world. Cf. NCPAC, 470 U.S. at 493 ("[F]or purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than $1,000 to

present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system").

In those instances in which a restriction on spending is found actually to curtail the ability to speak, there may independently be governmental power to limit the volume of expenditure because of power to limit the "volume" (or amount) of speech. As Alexander Meiklejohn has observed, there is a difference between abridging the "freedom of speech" -- which is forbidden -- and abridging speech, which is in some instances permissible. A. Meiklejohn, Free Speech and Its Relevance to Self-Government 19 (1948).

As Professor Emerson noted, while government may not regulate "expression that is thought to harm other social interests," government may regulate speech to "promote the goals of the system" of free expression itself, including improvement in the "quality

and meaningfulness of expression." T. Emerson, The System of Freedom of Expression 633 (1970). In Emerson's view, the question is "whether there has been an 'abridgment' of freedom of expression," and the answer is "framed in terms of accomodation of interests within the system," meaning "promotion rather than deterence of expression." Id. at 629 (emphasis added).

In short, neither Emerson, Meiklejohn, nor Amicus here would assert that speech could be limited to improve its "quality" by eliminating speech that the government regarded as of inferior ideological or intellectual content, for this involves the abridgment of speech on the basis of values derived outside the system of free expression itself. However, government may, in proper instances, act as a "traffic cop" to improve the quality of the functioning of the system, much as government keeps traffic flowing through an intersection.

Thus, Meiklejohn has observed that "[t]he First Amendment . . . is not the guardian of unregulated talkativeness." Meiklejohn, supra, at 25. Thus, in Meiklejohn's famous example, speech may be limited at a town meeting in order to ensure other speakers their right to speak. Similarly, Judge Skelley Wright has asserted that

> [e]xpenditure limits and other curbs on campaign finance practices are analogous to rules of order at a town meeting, enforced so that the deliberative process is not distorted. The first amendment does not permit curbs on general discussion of political, economic, or social controversies. But, like the loud mouth and long talker at the town meeting, untrammeled spending during an election campaign does not serve the values of self-government, nor can it lay claim to first amendment protection.

Wright, Money and the Pollution of Politics: Is the First Amendment an Obtsacle to Political Equality?, 82 Colum. L. Rev. 609, 639 (1982).

This does not mean that the government could, without more prohibit repetitive speech -- a campaign expenditure level would not be acceptable simply because it is high enough to let one say what he or she has to say once, but no more. In the absence of a compelling governmental interest -- or a competing interest springing from the system of free expression itself -- the government may not regulate "talkativeness" or the speaker's right to repeat his message as much as he likes or attempt to reach as many listeners as he wishes.

Thus, such limitation of speech must be predicated upon the "the forum['s being] limited by physical, technological, or economic factors." Wright, supra, 82 Colum. L. Rev. at 640. The fact that one individual may possess greater skills or resources in putting across his message does not suffice to show such an inherent limitation in the forum as to require government interference

in rationing access to the forum. Rather, the nature of the forum itself must require the rationing.

In the campaign context, it can be argued that there is no inherent rationing required because each citizen is as free as the next to spread her views through speaking, handbilling, and other first amendment actions; thus, the greater ability of those with greater resources to attain their goals through the free market of expression is constitutionally irrelevant. See, e.g., Buckley, 424 U.S. at 39-51. But this ignores the realities of modern campaigns.

C. Reasonable expenditure limits are required to ration access to the most expensive and effective means of political speech on some basis other than wealth.

As the per curiam opinion in Buckley acknowledged, "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." Buckley, 424 U.S. at 19 (emphasis added). And see NCPAC, 470 U.S. at 493 ("The PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold; they spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements."). And, as this Court has recognized, access to these expensive and indispensable instruments of effective political speech -- particularly television -- by their nature must be

rationed, and ought properly be rationed on some basis other than mere wealth.

In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), this Court upheld the constitutionality of the FCC "fairness doctrine" requiring broadcasters to give free air time, in specific instances, to those with opposing viewpoints. The Court recognized that this limitation on the broadcaster's right to use as he saw fit the broadcast time he "owned" would "enhance rather than abridge the freedoms of speech and press." Id. at 375. This was because of the "scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views." Id. at 400.

In short, as the airwaves are a physically or technologically limited forum, regulation that adds to the stock of

expressed attitudes on a more equal basis is permissible. It is, after all, "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market." Red Lion, 395 U.S. at 390.

Thus, in rejecting a rule that would compel broadcasters to air paid messages, the Court in CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), found that a right to spend as much money as one wanted to "speak" on television would be "so heavily weighted in favor of the financially affluent, or those with access to wealth" that the system of freedom of expression "would scarcely be served." Id. at 123. "[T]he views of the affluent could well prevail over those of the others," Chief Justice Burger observed for the Court, "since they would have it within their power to purchase time more frequently." Id.

This Court has thus found that the right to spend money to facilitate speech is not unlimited; rather, where access to the relevant forum is itself limited, government may ration that access on a content-neutral basis other than wealth. "Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others." Red Lion, 395 U.S. at 387.

A legislative body could well find that, as this Court itself has stated, expensive mass media -- particularly the electronic media -- are the "indispensable instruments of effective political speech" central to campaign communication today, Buckley, 424 U.S. at 19 (emphasis added), and that

rationing of access to such media is essential to preserving the integrity of the political process and the first amendment. And as major campaign contributors primarily "spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements," NCPAC, 470 U.S. at 493 (emphasis added), a rational legislature could today conclude that the valid rationing of access to mass media in the campaign context and the limitation of campaign expenditures are essentially synonymous.

In short, the legitimate protection of "the system of freedom of expression" in the dominant fora of the modern political campaign essentially requires regulation of campaign expenditures. Thus, legislative limitations on political campaign expenditures, so long as reasonable within the foregoing analytic framework, ought to carry a fair presumption of constitutionality

under the first amendment. Accord T. Emerson, The System of Freedom of Expression 639-40 (1970) (campaign limits permissible because they "are directed to a limited end and deal with a limited situation").

D. The constitutionality of government rationing of access to effective but limited fora on some basis other than wealth is reinforced by the need to reduce the corrupting effects of money on the political process.

That the de facto rationing of access to the most effective means of communication in modern campaigns should not be carried out on the sole basis of access to large agglomerations of money is bolstered by this Court's long-held conviction that "preventing corruption or the appearance of corruption" constitute a legitimate and compelling governmental interest in the regulation of campaign finance. NCPAC, 470 U.S. at 496-97.

In NCPAC, the Court objected, however, that "precisely what the 'corruption' may consist of we are never told with assurance." 470 U.S. at 498. The corruption of the political process at issue, of course, is not outright bribery -- but open bribery is not the only form that corruption may take.

Money, in the popular imagination and in fact, appears to be the largest, if not the single, determinant of electoral success. As Michael S. Berman, a long-time national political operative, has commented, "[i]n his experience as a campaign organizer, he had always operated under the premise that 'if I had enough money, I can do it [win the election]'." Comments, Special Forum on Proposed Reforms in Campaign Financing, 3 J.L. & Pol. 419, 500 (1986). And as two esteemed federal judges have observed, the FEC has reported that a two-to-one expenditure advantage over one's opponent translates into a 93% probability of

election. See, Wald, Two Unsolved Constitutional Problems, 49 U. Pitt. L. Rev. 753, 754 (1988); Wright, Money and the Pollution of Politics, supra, 82 Colum. L. Rev. at 622 (1982).

The amount of money required to obtain public office, meanwhile, is sky-rocketing. Candidates for the Senate spent five times as much, and House candidates four times as much, in 1985-86 as a decade earlier. See M. Barone & G. Ujifusa, The Almanac of American Politics: 1988, at 1363 (1987). The result has, not unpredictably, been the declining relevance of the small, individual contributor. Contributions of $100 or less fell from 38% of the financing of U.S. Senate races in 1974 to only 23% in 1986; for House races, the drop off is even more dramatic, falling from 46% to only 13% in the last election cycle. Conlon, The Declining Role of Individual Contributions in Financing

Congressional Campaigns, 3 J.L. & Pol. 467, 471, 476 n.4, 479 (1986).

The role of PAC's has concommitantly grown; PAC contributions have risen from only $12 million in 1974 to $132 million in 1986 and '87. Cong. Res. Svce., Report on Campaign Financing 6 (Update, July 2, 1987). While some of these PAC's still represent "mechanisms by which large numbers of individuals of modest means can join together," NCPAC, 470 U.S. at 494, PAC's are by no means purely, or even predominantly, "ideological mutual funds." PAC's are, rather, the predominant means by which large aggregations of corporate wealth are injected into the electoral process today. In fact, the vice president for "political education" of the Business-Industry Political Action Committee has asserted that "[i]f anything, corporate America has been timid in the full exercise of its power to make campaign contributions and influence candidates."

Budde, Business-Related Political Action Committees -- A Permanent Force After One Decade, 3 J.L. & Pol. 449, 453 (1986).

The individuals or entities that can supply (whether indirectly through the official campaign apparatus, or directly through his own expenditures on behalf of the candidate) the large cash infusions needed to compete for office today are the candidate's and officeholder's lifeblood. Thus, the point is not that "candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs," NCPAC, 470 U.S. at 498, but that candidates and elected officials must, in general, "alter or reaffirm their . . . positions on issues in response to" the availability of large aggregations of money, if they wish to remain competitive.

As Professor Freund has observed, such large contributors "are operating vicariously

through the power of their purse, rather than through the power of their ideas, and . . . I would scale that relatively lower in the hierarchy of First Amendment values." Freund, Commentary in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 74 (Citizens' Research Foundation Study No. 18) (1971).

The insidious effects of large concentrations of money in our politics are not just that this money in large measure predestines election results, thereby predisposing politicians toward the positions of the wielders of such sums, but also that the positions taken by candidates -- at least, those who run to win and not just to state their principles -- are largely constrained by the preferences not of the electorate as a whole but rather of the purveyors of the necessary campaign finances. See, e.g., Cox, Constitutional Issues in the Regulation of the Financing of Election

Campaigns, supra, 31 Cleve. St. L. Rev. at 399-401.

We should certainly be concerned where the range of positions presented to the electorate is constrained, in no small degree, by those entities with large sums of money available, cf. Bullock v. Carter, 405 U.S. 134 (1971) (large candidate filing fee unconstitutionally limits voter choice to those views supported by substantially monied voters); Lubin v. Panish, 415 U.S. 709 (1974). This is even more true where those exercising this inordinate influence are not even themselves entitled to vote but are, rather, artificial and purely commercial "persons."

E. Rationing access to effective but limited campaign fora on some basis other than wealth is especially justified when applied to corporations organized for profit.

The use of the corporate form to collect money for profit and then expend it in the political campaign context is particularly problematic. As the Court recently asserted,

> concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.. . . Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.. . . The reasources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 257-58.

Thus, the argument for full first amendment protection of corporate political campaign expenditures has already been severely undercut on several fronts. The well-established doctrine of commercial speech, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), in fact provides lessened first amendment protection not for commercial speech but for commercial speakers:

> The same substantive speech (e.g., wage rates, product quality, or business patronage) becomes fully-protected, non-commercial speech when spoken by someone other than the commercially concerned entity.

Compare Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state may bar lawyer solicitation for pecuniary gain), with In re Primus, 436 U.S. 412 (1978) (state may not normally bar legal organization from soliciting in furtherance of "political and ideological goals of the association"); and

compare Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (government may bar commercial circulation of birth control materials and brochure advocating their use) with Eisenstadt v. Baird, 405 U.S. 438 (1972) (state cannot proscribe dispensing of birth control materials or advocacy of their use). And see NAACP v. Claiborne Hardware, 458 U.S. 886 (1982); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Thus, one's status as a commercial actor has already been accepted as justification at least in part for lessened first amendment protection.

That for-profit corporations have lessened first amendment rights is certainly not a novel proposition. In Bellotti, after noting that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory incrimination" -- or "equality with individuals in the enjoyment of a right to privacy," -- "are unavailable to corporations and other organizations because

the 'historic function' of the particular guarantee has been limited to the protection of individuals," 435 U.S. at 779 n.14 (per curiam opinion) (citations omitted), the Court wrote that "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision. Id.

As Justice White noted in his Bellotti dissent, though, "what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech." Id. at 304-05 (White, J., dissenting) (citing T. Emerson, Toward a General Theory of the First Amendment 4-7 (1966); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)). Indeed, the Court has long recognized in the antitrust context that

the government may curtail business corporations' speech and associational rights so as to preclude combining expenditures or any aspect of operations unless trade is not restrained, or to forbid even basic or indirect communication on matters of price. See, e.g., United States v. Container Corp., 393 U.S. 333 (1969).

The first amendment question at issue here, then, "is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process." Bellotti. at 809. Since the state "indirectly assist[s] the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities[, s]uch

expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas." Id. at 810. And see id. at 825-26 (Rehnquist, J., dissenting).

Limitiations on corporate political speech, moreover, do not infringe on the ability of any individual to participate in campaign speech -- the true "core value" of the first amendment -- because any corporate investor, owner, or manager is free to use his or her own resources for first amendment purposes as he or she chooses. A corporation, after all, is not a real person with any right to participate in the electoral system; it is a legal device for the promotion of enterprise through the pooling of resources by any number of individuals -- all of whom are free to use their resources, including those they gain from their corporate investments, for expressive purposes.

As noted at the outset, moreover, the level of political expenditure relates only very tenuously to any expressive content beyond simply the initial marginal act of spending. The incongruity between the expressive content of the expenditure and the pure economic value of the expenditure is exacerbated in the for-profit corporate context, however, by the fact that the amount of money available to traditional, profit-making corporations does not function, as this Court has acknowledged, as any more than "a rough barometer of public support for" their ideas, see MCFL, 479 U.S. at 258.

The particular merit, at least for first amendment purposes, of the ideological corporation, in contrast, is that its capital is accumluated specifically for the purpose of communicating the views in question. For-profit coporate money may, instead, in fact be used to espouse views contrary to those of the shareholders or workers who made

the funds available, and who have no realistic ability to protest or control such uses, see NRWC, 459 at 207. There is thus even less reason to suppose that the first amendment protects the for-profit corporation against restrictions on transferring its unique clout in the economic marketplace directly to the political marketplace.

In sum, the protections of the first amendment are at their lowest in the context of political expenditures by a purely commercial corporate entity. The potentially corrupting effect on the political process of political expenditures is also at its highest. Moreover, the legislative interest in limiting politcal campaign expenditures in the reality of the modern campaign environment actually itself furthers a valid and compelling first amendment objective of providing adequate speech for all speakers by rationing access to the most "indispensable" political fora. This Court should therefore

uphold legislative proscription or limitation of corporate political campaign expenditures.

II. THE MICHIGAN LEGISLATURE HAS NOT EXERCISED ITS POWER TO BAN ALL CORPORATE FUNDS FROM ENTERING THE POLITICAL MARKETPLACE, BUT RATHER HAS SIMPLY BARRED ALL NON-PAC CORPORATE EXPENDITURES; HENCE, EXPENDITURES BY THE CHAMBER -- A NON-PROFIT IDEOLOGICAL CORPORATION PROTECTED UNDER MCFL -- ARE LAWFUL.

In the foregoing Section, Amicus suggested that corporate funds can be completely banned from injection into a political campaign.

As noted, however, the corporate form is not the determinant eo ipso of when electoral integrity concerns are sufficient to overcome traditional first amendment protection; "voluntary associations" and ideological corporations may not and should not be treated in the same way as profit-making enterprises. "Voluntary political

associations do not suddenly present the spectre of corruption merely by assuming the corporate form." MCFL, 479 U.S. at 263. For example, the Federal Election Commission permits a political committee to incorporate "for liability limitation purposes only." 11 C.F.R. Sec. 114.12(a).

"Undoubtedly, as this Court has recognized, see NAACP v. Button, 371 U.S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits." Bellotti, 435 U.S. at 805 (White, J. dissenting).

Thus, "voluntary associations," whether incorporated or not, are afforded -- as are individuals -- full first amendment protection in expenditures constituting political advocacy. MCFL, 479 U.S. at 263. Traditional, profit-making corporations, however, can be subject to stringent regulation of campaign expenditures because of the serious threat to "the integrity of the marketplace of political ideas" raised by "the corrosive influence of concentrated corporate wealth." Id. 257. "As we said in California Medical Ass'n v. FEC, 453 U.S. 182 (1981), the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" NRWC, 459 U.S. at 210.

The Court of Appeals -- noting that "[t]he Chamber is not a sub-corporation established by a parent corporation," Austin, 856 F.2d at 789 -- found that the

Chamber of Commerce was a "voluntary political association," 856 F.2d at 788, and therefore could not be subject to corporate campaign expenditure restrictions.

Appellants and supporting amici argue that this finding opens up a potentially massive loophole in corporate campaign contribution legislation, allowing such organizations to do an end-run around the distinction between corporations formed for ideological purposes and those formed as profit-making enterprises. It is argued that allowing ostensibly ideological, non-profit corporations formed primarily by for-profit corporations to qualify for full first amendment protection equally with non-profits and voluntary associations not associated with the profit-making sector would vitiate the "different forms of regulation" needed to address "the 'differing structures and purposes' of different entities" in the context of "protect[ing] the integrity of the

electoral process." National Right to Work Comm., 459 U.S. at 210.

Such business-affiliated non-profit, ideological corporations do indeed constitute a large hole in any comprehensive attempt to eliminate corporate funds from the political environment. However, as this Court has recognized, such an exemption is required by the first amendment. MCFL, supra. Nonetheless, it is a hole that, if not closeable, is at least bridgeable.

The government may not only prohibit corporations from directly injecting money into the political campaign process; it may also prohibit corporations from indirectly funneling money into the process through non-profit, ideological corporations. While such ideological or voluntary associations cannot be denied the exercise of their first amendment rights simply because of their receipt of corporate funds in other contexts, cf. Perry v. Sinderman, 408 U.S. 593 (1972);

Speiser v. Randall, 357 U.S. 513, 526 (1958), they may be required to segregate such funds from their political activities.

For instance, ideological corporations or voluntary associations can be required to maintain segregated accounts to demonstrate that corporate funding of those organizations do not subsidize political campaign activities. Federal regulations currently provide that federal political committees that cannot accept business or labor contributions may nonetheless establish non-federal accounts that accept such funds for state campaigns, where permitted by state law. See 11 C.F.R. Sec. 102.5.

Similarly, the Internal Revenue Code prohibits private foundations from making grants earmarked for lobbying, but allows such foundations to provide general support grants to public charities that do in fact lobby but requires such charities to demonstrate that their lobbying activities

were not subsidized by the foundation grants. See 26 C.F.R. Sec. 53.4945-2.

In short, segregation of funds is already a commonly applied and easily enforced principle. It allows the government to address the valid concern with corporate contributions somehow "leaking" into electoral advocacy. But, as corporate gifts are often vital to a non-profit, ideological, or voluntary organization's charitable or civic activities unrelated to electoral politics, such segregation-of-funds regulations allow these organizations to continue the first amendment activities central to their existence as well as their constitutionally protected electoral advocacy. In this way, the first amendment concerns prompting corporate campaign expenditure limitations, see supra Section I, can be advanced without mandating that voluntary and ideological organizations choose between alternative first amendment

activities, both of which they are constitutionally permitted to pursue.

However, this the Michigan legislature has not done. The Michigan Campaign Finance Act prohibits contributions and expenditures by corporations, except through segregated PAC accounts; such a restriction, under MCFL, cannot apply to non-profit, ideological corporations, which the Court of Appeals found to include the Michigan Chamber of Commerce. The Act contains no separate provision such as those discussed above, requiring a non-profit such as the Chamber to segregate funds originating from corporate sources and those to be used for campaign advocacy, however.

The Chamber was thus entitled to expend its funds on campaign advocacy. This case requires the careful balancing of, on the one hand, the state's power to protect its democratic institutions from domination by large aggregations of wealth through the

limitation or proscription of corporate campaign expenditures; and, on the other hand, the constitutional protection of non-profit, ideologically based expression and giving through the corporate format. The result in the Court of Appeals therefore ought to be affirmed.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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